Wolff & Munier, Inc. and Robert Campione. Case 22-CA-10279

June 21, 1982

DECISION AND ORDER

By Members Jenkins, Zimmerman, and Hunter

On November 6, 1981, Administrative Law Judge Thomas T. Trunkes issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief¹ and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order.⁴

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wolff &

¹ The Board finds it inappropriate, in the circumstances presented here, to defer to the decision of the Joint Conference Committee disposing of grievances filed over the discharges that gave rise to the instant 8(a)(3) and (1) allegations. Although Member Hunter favors the principles of deferral established in Spielberg Manufacturing Company, 112 NLRB 1080 (1955), he finds that the instant record does not justify deferring to the rievance award in this case. As set forth in the Administrative Law Judge's Decision, the discriminatees, employees within the meaning of the Act, were discharged explicitly for engaging in union activities. However, an ambiguously worded Joint Conference Committee award disposed of the grievances filed over the discharges by stating that there should be "no restriction" on Respondent's right to discharge these employees. Clearly, the National Labor Relations Act protects the right of employees to engage in union activities, and Member Hunter will not defer to a grievance award that indicates on its face that statutory protections have neither been considered nor have any application in these circumstances

The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

² We note that the employees who the Administrative Law Judge found were threatened and discharged in violation of Sec. 8(a)(1) and (3) are classified foremen and, in one case, a general foreman. No contention has been made, and the record evidence does not establish, that these individuals are supervisors within the meaning of Sec. 2(11) of the Act.

The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products. Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

^a We find without merit the Respondent's contention that the Administrative Law Judge exhibited prejudice in his conduct of the hearing.

⁴ In accordance with his partial dissent in Olympic Medical Corporation, 250 NLRB 146 (1980), 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

Munier, Inc., Elmsford, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten employees with loss of employment for engaging in protected concerted or union activities.

WE WILL NOT discourage membership in Local Union No. 24 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, or any other labor organization, by discriminating against our employees in regard to hire or tenure of employment or any other term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guarantee them by Section 7 of the Act.

WE WILL offer to Ralph Campione, Robert Campione, and Walter Dowd immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make Ralph Campione, Robert Campione, and Walter Dowd whole for any loss of earnings suffered by them by reason of their discriminatory terminations, with interest.

WOLFF & MUNIER, INC.

DECISION

STATEMENT OF THE CASE

THOMAS T. TRUNKES, Administrative Law Judge: The above proceeding was heard in Newark, New Jersey, on May 26, 1981, upon a charge filed on September 17, 1980, by Robert Campione, an individual, and a complaint issued thereon on October 31, 1980, pursuant to Section 10(b) of the National Labor Relations Act, as

amended, herein called the Act, which alleges that Wolff & Munier, Inc., herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by threats to certain employees and by discharge of three employees, including the Charging Party.

All parties were represented at and participated at the hearing, and had full opportunity to adduce evidence, to examine and cross-examine witnesses, to file briefs, and to argue orally. Both counsel for the General Counsel, herein the General Counsel, and Respondent waived oral argument and both filed briefs. The issues presented in this case are the following:

- 1. Whether Respondent, acting through its supervisor and agent, Emil LeDoux, threatened employees with discharge for speaking at union meetings against Respondent, in violation of Section 8(a)(1) of the Act.
- 2. Whether Respondent, through Emil LeDoux, discharged Robert Campione and Walter Dowd.
- 3. Whether Respondent, through Emil LeDoux, discharged Robert Campione, Walter Dowd, and Ralph Campione because of their assistance and activities on behalf of Local Union No. 24 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, herein called the Union, or because they engaged in other protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

FINDINGS OF FACT

I. JURISDICTION

The pleadings established and I find that Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York. At all times material herein, Respondent, with its principal office and place of business at 525 Executive Boulevard, Elmsford, New York, is a contractor in the building and construction industry engaged in the business of performing mechanical contracting in engineering construction work at various jobsites located in the State of New Jersey, including a construction site located at 800 Wilson Avenue, Newark, New Jersey, and is now, and has been at all times material herein, continuously engaged at said jobsite in the business of providing and performing mechanical, contracting, engineering, and related services. In the course and conduct of Respondent's business operations during the preceding 12 months, said operations being representative of its operations at all times material herein, Respondent provided and performed services valued in excess of \$50,000, of which services valued in excess of \$50,000 were provided and performed within States of the United States other than the State of New York wherein Respondent is located. Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondent stipulated at the hearing and I find that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Operations of Respondent

Respondent operates the Passaic Valley sewage treatment plant at Newark, New Jersey, herein called the Passaic Valley jobsite. At this jobsite are four buildings designated as buildings 481, 483, 491, and 492. Buildings 491 and 492 are attached and are located approximately 1,200 feet distant from buildings 481 and 483.

At the jobsite, Respondent employs tradesmen from various construction trades, including plumbers, carpenters, steamfitters, and laborers, among others.² During the months of August and September 1980,³ Respondent employed approximately 30 plumbers, including 2 general foremen, 3 foremen, and several apprentice plumbers, with the remainder classified as journeyman plumbers. The superintendent of the Passaic Valley jobsite is Emil LeDoux, hereinafer called LeDoux.

All the plumbers employed by Respondent were obtained from an exclusive hiring hall operated by the Union.

Ralph Campione, hereinafter called Ralph, was hired as a journeyman plumber in March 1978. He became a foreman in June or July 1978, and was promoted by Respondent to general foreman in June or July 1979, the position held until his termination on September 9.

Robert Campione, hereinafter called Robert, was hired by Respondent in May 1979 as a foreman for building 492. He worked as a foreman until September 9.

Walter Dowd, hereinafter called Dowd, commenced his employment with Respondent in August or September 1979 as a journeyman plumber. He remained on the job until January 1980. In March 1980, he was rehired by Respondent and approximately 3 months later, while employed in building 483, he was promoted to foreman and transferred to building 492, where he worked until terminated on September 9.

2. Union activity of the alleged discriminatees

The Union held monthly meetings of its members. The meeting scheduled for August 1980 took place on August 28. Approximately 75 union members attended the meeting, including approximately 10 plumbers employed by Respondent at the Passaic Valley jobsite. Included in this group were Ralph, Robert, and Dowd. The testimony of Ralph, Robert, and Dowd, as well as confirming testimony by Ray McDonough, another plumber employed by Respondent, established that during the course of the union meeting Ralph, Robert,

¹ The Charging Party was represented by the General Counsel only.

^a The employees invo'ved herein, including the alleged discriminatees, are all plumbers and members of the Union.

⁸ All dates, unless otherwise noted, refer to the year 1980.

and Dowd all complained to the union leadership with respect to work duties normally performed by plumbers being performed by members of other craft unions at the Passaic Valley jobsite. Accusations were made that the union officials were not performing their duties in seeing that plumbing functions were performed by members of the Union.

B. Events of September 9, 1980

1. Termination of Ralph Campione

Ralph testified that on September 9, he went to Le-Doux's office to submit the time reports. According to Ralph, LeDoux told him that he was terminating his employment. He further stated that he was aware of the happenings at the union meeting and that he was "sick and tired of the agents coming down on him." He further declared that he had warned Ralph many times not to be involved in union politics. Upon being questioned by Ralph with respect to his work performance, LeDoux responded that Ralph was a good general foreman and that he was not dissatisfied with his work. He ended the conversation by stating that he was going to "take care of your brother, Bobby, and Walter Dowd next."

LeDoux responded to Ralph's testimony as follows:

LeDoux had initially decided to remove Ralph as the general foreman and offer him a position as a journey-man plumber. His reasoning was that there were too many foremen in relation to mechanics and apprentices and he felt that Ralph was not performing his duties as foreman satisfactorily. LeDoux testified that, after notifying Ralph of his plans, Ralph became belligerent, asserting that LeDoux "had been fed up and had been told to get rid of him." Upon hearing this, LeDoux changed his mind and summarily terminated Ralph from all employment for Respondent.

2. Termination of Robert Campione and Walter Dowd

Robert testified that early on the morning of September 9, while he and Ray McDonough were working, he was summoned along with Dowd to LeDoux's office. He testified that LeDoux's opening remark to him and Dowd was that he was "sick and tired of having the agents coming down on him." Robert responded that he did not know what LeDoux was talking about. LeDoux retorted that he was "sick and tired and did not want his men jeopardizing Respondent by bringing discussions on outside areas and political involvement. What he wanted was the men working for him to do their jobs, to be responsible for Respondent in that area and not to say nothing to nobody." Robert testified that Dowd, who did most of the talking that day, responded to LeDoux that "he can't accept that," adding, "we can't be yes men on this job for anybody. If we see something wrong here we can't—we don't look ourselves in the face and not discuss it with somebody else pertaining to our local or

anything else. We will do our work but as far as any problems similarly to jurisdictional work or anything of that nature, we're compelled by our union to discuss it." After further discussion, LeDoux announced that he had no other choice but to let Robert and Dowd go. He suggested that they think about their decision and return in an hour or so to notify him what the decision was. Robert recalled that Dowd asked LeDoux about the quality of their work, to which LeDoux answered that he had no complaints.

Robert testified that he did not return to notify LeDoux of his decision. At approximately 3:30 the same afternoon, Herb Seifert, another general foreman, gave Robert his paycheck, stating that he could not understand what was happening and that he hated to see Robert go.

Dowd testified that on September 9, while working at the jobsite, Ralph informed him that he had been discharged and that LeDoux wanted to see both Robert and Dowd. Thereafter Robert and Dowd went to Le-Doux's office, where LeDoux apprised both of them that he had discharged Ralph and "if you men can stop your political involvements and just do your job and don't get involved in politics, I can keep you." Dowd responded that "he's being asked to do something that he does not think he can do." Shortly thereafter, Seifert told Dowd that he did not understand why Robert and Dowd were quitting. Dowd responded that he was not quitting, returned to LeDoux's office, and informed him of that fact. LeDoux responded, "I know you're not quitting, I'm letting you go." Dowd confirmed Robert's testimony that, approximately 3:30 p.m. that day, Seifert handed them their paychecks, stating that he was sorry to see Robert

LeDoux's version of his conversation with Robert and Dowd on the morning of September 9 was as follows:

After LeDoux announced that Ralph had been discharged, he stated to the two foremen, "I'm not interested in what you do after hours. Before 8 and after 4:30 you do as you please. It's none of my concern. During that period of time between 8 a.m. and 4:30 p.m. you are to conduct yourselves as supervisors and keep the men working. That's it. I don't want to know any of your problems. I don't know what your problems are, but I do know because you told me." Both Robert and Dowd responded that they could not do as asked. LeDoux asked them to think about it and return later for their final decision. As neither man returned within the allotted time, he sent Seisert to ascertain their decision. Seifert returned, stating, "They're going." He therefore gave Seifert paychecks to be delivered to them later. He did not speak with either Robert or Dowd any time after that date.

Herbert Seifert testified as a witness for Respondent. He stated that he is a general foreman of plumbers for Respondent at the Passaic Valley jobsite, working at various times at the four locations in buildings 481, 483, 491, and 492. He has been a member of the Union for the past 35 years. Seifert testified that, on September 9, LeDoux asked him to find out what Robert and Dowd were going to do, explaining to Seifert what had occurred ear-

No evidence was adduced to indicate that any other members voiced similar complaints.

⁶ Submissions of time reports of journeyman plumbers were an integral function of the general foreman.

lier. He thereafter spoke to both Robert and Dowd and was told that they were leaving, which message he relayed to LeDoux. He testified that later in the afternoon he handed the two foremen their paychecks. Seifert also testified that LeDoux informed him that Ralph was fired but did not tell him that Robert or Dowd had been fired. On cross-examination, Seifert admitted that LeDoux had expressed to him that a problem existed involving jurisdictional disputes which upset LeDoux. He directed Seifert to find out if the men were staying or leaving as he had afforded them an option. Seifert further testified that, approximately a week or so later, LeDoux acknowledged that he was sorry to see the men go and, "this thing with the Union, the talk about who does this and who doesn't do it was getting out of hand and he brought it up to them, you know, that was their option that they had, either they could work as foremen or they would leave the job." Seifert also acknowledged that Dowd and Robert were good foremen.

C. Post-Termination Events

1. Involvement of Shop Steward Smith

Joseph Smith, an employee for Respondent as a journeyman plumber for approximately 4 years, and the shop steward for the Union at the jobsite, testified as follows: Smith discovered that the three foremen were terminated when Ralph and Dowd so informed him at the end of the working day on September 9, about 3:45. Smith told them that it was too late to notify the Union of the terminations which he would do the following day, and further stated that he would approach LeDoux to inquire as to the reasons for the terminations inasmuch as it was unusual for three foremen, one of whom was a general foreman, to be let go at the same time. The next morning, Smith called the union hall and informed Connie Hoffman, a union official, what had happened. Hoffman responded that he knew about it. Following that, Smith visited LeDoux and asked for the reasons for the discharge of the three alleged discriminatees. LeDoux responded that Robert and Dowd both could stay on the job if they wished, but they were to pay strict attention to the work they were employed to do and "if they see anything to our work, if the fitters were doing our work, just to pay strict attention to doing the job they were employed to do." LeDoux further stated that there was no way that he would keep Ralph on the job, asserting that he was fed up with Ralph's politicking on the job and that he caused too many problems in the union hall. LeDoux did admit that Ralph was a good foreman who did his job, "but that he fed up with all the politicking on the job-too much discussion in the union hall and he was slandering Wolff & Munier he was giving Wolff & Munier a bad name and he had to let Ralph go." LeDoux also stated that he was pleased with the work of Robert and Dowd.

2. Filing of the grievance with the Union

Ralph testified that, although the three discharged employees had informed the shop steward of their problems, they were aware that he would not be in a position to obtain their jobs back for them. Therefore, the three

discriminatees journeyed to the union hall the following day to complain to James McManus, a union official, who assured them that he would handle the matter henceforth. Hearing nothing from McManus or Smith, and having only 10 days under the union rules to file a grievance, the alleged discriminatees filed a grievance with the Union's "E" board. The Union's E board consists of the vice president and four or five members who sit on the board. The E board concluded that the men had a legitimate grievance and arranged for a joint conference committee hearing consisting of five mechanical contractors and five officers of the Union. The joint conference committee was held on November 5 at the office of the Mechanical Contractor Association in East Orange, New Jersey. The joint committee voted that there was no restriction for an employer to terminate a foreman as the employer had the right to appoint him and therefore had the right to terminate him.6

D. Contention of the Parties

1. Contention of the General Counsel

It is the contention and argument of the General Counsel that the facts as elicited from the General Counsel's witnesses, as well as the credited facts elicited from Respondent's witnesses, together with the exhibits submitted by the parties, clearly demonstrate that Respondent was in violation of Section 8(a)(1) upon making threats to the alleged discriminatees forbidding them from discussing union matters involving Respondent's operations. Further, the General Counsel contends that both Robert and Dowd were discharged because of their failure to comply with the demands of Respondent. Lastly, the General Counsel contends that Ralph was discharged for having protested, in union meetings, work assignments of Respondent.

2. Respondent's contention

Respondent contends that an employer can regulate the conduct of its employees while at the workplace, including the prohibition of union activity during working hours. In addition, an employer has the right to hire and fire as its chooses, provided it is not being discriminatory. Firing an employee as a result of unfounded accusations is not violative of the Act. Respondent further contends that the General Counsel has not made a *prima facie* case showing that protective conduct was a motivating factor in Respondent's decision to discharge Ralph Campione.

E. Analysis and Discussion

1. Termination of Ralph Campione

As in the vast majority of cases involving alleged discriminatory discharges of employees in violation of Section 8(a)(3) and (1) of the Act, credibility resolution

⁶ See Resp. Exh. 3. It should be noted that, according to Ralph, the joint conference committee was proceeding along when Business Manager James McManus stated that three alleged discriminatees also had filled charges with the NLRB. Following that, the procedure was terminated.

is of paramount importance. The cases are legion in which the Board has found violations of Section 8(a)(3) and (1) with respect to illegal discharges. Each case must rise or fall on the factual determinations made by the administrative law judge. The instant case is no exception to this rule. For reasons discussed *infra*, I have concluded that the account of the conversation rendered by Ralph as against that rendered by LeDoux with respect to the conversation conducted by the two individuals in LeDoux's office on September 9 will be credited. Therefore, I have concluded that the termination of Ralph Campione by Emil LeDoux, acting as agent for Respondent, is violative of Section 8(a)(3) and (1) of the Act.

The reasons offered by Respondent for the termination of Ralph are twofold: (1) For sometime Ralph's performance had deteriorated and he was no longer performing his duties as a general foreman as expected by Respondent; and (2) there were too many supervisors on the jobsite in relation to the number of employees supervised by foremen so that it was necessary to cut back on the number of foremen on the job, and Ralph was chosen because of his poor performance record.

I credit Ralph who testified that, in a conversation with LeDoux in his office on September 9, LeDoux admitted to him that he was a good foreman, being one of the best he had. This is verified by Joseph Smith, a shop steward of the Union, who testified that LeDoux related to him that Ralph was a good foreman. LeDoux in his own words asserted during the hearing that a mechanic becomes a foreman because he is better than the average mechanic. There is no dispute that LeDoux was Respondent's agent principally responsible for the promotion of Ralph to foreman and later to general foreman. LeDoux testified that he is uncertain when Ralph's performance began to deteriorate, but first spoke to Ralph in 1979 before Ralph became a general foreman. LeDoux was very vague on this matter. He issued no written warnings to Ralph, but stated that he spoke to him orally. As Ralph was promoted subsequent to this discussion that LeDoux allegedly had with him with respect to his work performance, I cannot credit LeDoux's statement that Ralph's performance began to deteriorate in 1979. LeDoux was unable to explain, or failed to explain, what motivated him to promote Ralph to the position of general foreman if, prior to the promotion, he had already determined that Ralph's performance was deteriorating.

With respect to the supervisory ratio, Respondent's counsel, in his brief, summed up the General Counsel's Exhibits 2(a) through 2(i) which revealed the following:

Week Ending	Jour- neymen	Appren- tices	Fore- men Em- ployed	Fore- men Re- quired
8/5	29	3	6	4
8/12	28	3	6	4
8/19	23	3	6	3
8/26	23	3	6	3
9/2	23	3	6	3
9/9	23	3	6	3

Week Ending	Jour- neymen	Appren- tices	Fore- men Em- ployed	Fore- men Re- quired
9/16	22	3	4	3
9/23	22	3	4	3
9/30	23	3	4	3

Respondent thereafter argues that, as this is proof that there was an abundance of foremen on the jobsite, someone had to be let go.

The agreement effective from May 1, 1979, to April 30, 1981, between Respondent and the Union contains the following paragraph in section 12 under wages and fringe benefits:

12.2 On any job where there are two (2) or more journeymen employed, a foreman shall be designated by the employer. This foreman shall supervise no more than eight (8) journeymen. This foreman shall receive \$1.10 per hour more than the hourly rate for journeymen. When more than eight (8) journeymen are employed, another foreman shall be designated by the employer. This foreman shall receive \$1.10 more than the hourly rates for journeymen. When more than sixteen (16) journeymen are employed, a general foreman shall be designated by the employer. The general foreman shall receive \$1.60 per hour more than the hourly rate for journeymen. When more than thirty-two (32) journeymen are employed, an assistant general foreman shall be designated by the employer. He shall receive \$1.35 per hour more than the hourly rate for journeymen. All foremen shall be guaranteed a full week's work of five (5) days.

LeDoux stated that he abided by contract rules relating to the ratio of foremen and journeyman mechanics. However, an analysis of the contract terms discloses that, in addition to a general foreman, should more than 32 journeymen be employed, an assistant general foreman shall be designated by the employer. At no time during the hearing, in its brief, or anywhere else has Respondent explained why, instead of having one general foreman and one assistant general foreman, he had employed Ralph and Herb Seifert as general foremen, without any distinction made with respect to one being subordinate to the other. In addition, the contract states that a foreman shall supervise no more than eight journeymen, and further states that, where there are two or more journeymen employed, a foreman shall be designated by the employer. I do not interpret this contract term to signify that the employer is precluded from employing more than one foreman for each eight journeymen. The contract is clear that, after the employment of two or more journeymen, a foreman shall be designated. It clearly states that there must be a foreman for every eight journeymen, at the least. Robert testified that he supervised between one and two employees. This was not disputed by anyone. The shop steward explained that, although there were five foremen, there were in reality only three foremen, as the two general foremen were not obligated to supervise any gangs. Ralph credibly explained that the principal function of a foreman was to oversee the work of the journeymen and to see that they were performing their job as expected. A foreman thus could not cover a vast area. Therefore, depending on the locale of the journeymen, Respondent had to employ foremen to oversee the performance of the journeyman mechanics. For this reason Robert, working in a particular area, only supervised at maximum two journeyman mechanics.

It is noteworthy that LeDoux testified that the last of the foremen to be hired was James Connallon who had become a foreman 3 weeks before September 9. This would have occurred sometime in the middle of August. Yet General Counsel's Exhibit 2 reveals that, throughout the entire month of August, six foremen were employed, whereas Respondent required at most four foremen. Respondent offered no explanation, through either testimony or argument, on what basis Connallon received his employment as a foreman during a period of time an excess of foremen existed. Further, LeDoux testified that he discussed the matter with Francis Chang, the project manager at the jobsite, who had agreed with him that a cutback was necessary. It should be noted that Chang, according to Respondent's Exhibit 3, testified at the joint conference committee meeting relating to the termination of the three alleged discriminatees on November 5. However, for reasons unexplained by Respondent, Chang was not called as a witness to verify the statement of LeDoux.

Furthermore, LeDoux testified that the Company was losing money and that he had told Ralph verbally that it was in part Ralph's poor performance that caused this financial loss to the Company. LeDoux stated that the company records would show that money was being lost. He did not recall which company official advised him of this matter, but insisted that the company records would show a loss of money. However, at no time was any company official called to testify, nor did LeDoux nor anyone else come forth with any company records to substantiate LeDoux's testimony.

Lastly, I have carefully evaluated the testimony of Joseph Smith, the shop steward of the Union, an employee of Respondent at the jobsite. Smith testified that when he asked LeDoux the following day the reasons for the discharge of the employees questioned, LeDoux stated that Ralph caused too many problems in the union hall and that "he was sick and tired of his politicking and slandering" Respondent. He further testified that LeDoux acknowledged that Ralph was a good foreman and that he performed his job. This testimony was not disputed by Respondent in any manner. Neither did LeDoux refute Smith's testimony in any mode, nor did Respondent argue in its brief why Smith's testimony should not be credited. Therefore, I have no reason to discredit Smith who essentially supported Ralph's testimony.

For the myriad of reasons listed *supra*, I have concluded that the termination of Ralph Camione by Respondent occurred as a result of his protective concerted and

union activities, and thus is in violation of Section 8(a)(3) and (1) of the Act.

2. Termination of Robert Campione and Walter Dowd

For reasons stated *infra*, I find and conclude that Robert and Dowd were terminated by Respondent because of their protected concerted and union activities. Although LeDoux insisted that the employees quit and were not terminated by him, I credit Dowd's testimony that, upon being informed by Seifert that he did not know why the two individuals were quitting, he announced that he was not quitting and went to LeDoux's office to inform him that he was not quitting, to which LeDoux's response was, "I know you're not quitting, I'm letting you go." Dowd impressed me as a sincere, forthright individual who apparently had good recall of the facts surrounding the incident of September 9. I credit him on all matters in which there is conflict of testimony between LeDoux and him.

During cross-examination by the General Counsel, LeDoux asserted, with respect to Robert, that "we actually laid him off—he quit." Although Respondent may argue that this was a normal slip of the tongue, I find it incredible that LeDoux, while insisting that the two individuals had quit, would testify, in any manner, that they were laid off.

Furthermore, LeDoux's explanation for consulting with Robert and Dowd, following the termination of Ralph, lacks credibility. He asserted that he wanted to alert all his foremen that they were not to discuss union matters while on the jobsite. However, he does acknowledge that neither Seifert nor Connallon was consulted on this subject matter. I can understand his failure to discuss the matter with Seifert, a general foreman who worked closely with LeDoux. However, inasmuch as the facts establish that Connallon was a recently appointed supervisor of less than 3 weeks' duration, it would appear that he would be in need of such instructions from LeDoux as much as, if not more than, the three alleged discriminatees interviewed by LeDoux on that date. His failure to discuss the matter with Connallon is indicative of his awareness of the participation of the three alleged discriminatees at the union meeting of August 28, and not of his concern of his foremen discussing matters not relating to their work performance on the jobsite.

Assuming, arguendo, that both Robert and Dowd quit their employment rather than being discharged by Respondent, as counsel for the General Counsel correctly indicates in her brief, to condition employment upon abandonment by employees of Section 7 rights is equivalent to discharging them outright for union activity (Block-Southland Sportswear, Inc., 170 NLRB 936, 938 (1968)).7

⁷ I have carefully considered the briefs submitted by counsel for Respondent in this matter. However, I must reject both the facts as related by Respondent and the arguments which flow from the facts. I find nothing in this case to indicate that the Union, or any of its representatives, participated in a slowdown or strike and there is nothing to indicate that Sec. 8(b)(4)(D) of the Act has been violated by the Union in any manner. Assuming that such may be the case, this matter is not before me at this time as no charges have been filed, nor has a complaint issued with respect to any possible violations of the Act by the Union or its members.

3. Threat to discharge Robert Campione and Walter Dowd

Having credited the testimony of Dowd and Robert, I further conclude that, prior to the termination of these employees, Respondent, through Emil LeDoux, its agent and supervisor, threatened these employees with discharge for engaging in union activities in violation of Section 8(a)(1) of the Act. The Board has held on many occasions that such statements as I charge to LeDoux were violative of the Act. As recently as this year, the Board has found an 8(a)(1) violation when a representative of a company stated, "I heard what you said at the union meeting and I can't have you running around talking about your problems." (Cecil Walker Machinery Co., 257 NLRB 536 (1981).)

Although counsel for Respondent argues in his brief that an employer has the right to regulate the conduct of its employees while working at the employer's place of business, I do not find his argument persuasive as the facts provided by him and the legal conclusions drawn from them are inapposite to the facts and conclusions of the instant case.

During the course of the hearing, Respondent offered evidence and argued that the discharges of the three individuals had been settled previously through an arbitration proceeding and therefore the Board should be bound by this proceeding. The evidence establishes that, at a joint council meeting between representatives of the Union and Respondent, it was agreed that an employer had the right to hire and discharge foremen as he saw fit. The matter was not presented to an arbitrator thereafter. At no time was the matter of unfair labor practices discussed between the parties.

Pursuant to settled Board authority, the Board will withhold its jurisdiction and defer to a decision by either an arbitrator or bipartisan panel⁸ empowered to render final and binding decisions with respect to grievances under a collective-bargaining agreement, where said determinations arise from a proceeding, fair and regular on its face, where all parties have been bound, and where the decision is not repugnant to the purposes and policies of the Act. See Spielberg Manufacturing Company, 112 NLRB 1080 (1955). However, in the instant case, there is not a scintilla of evidence that the joint council considered, in any manner, a possible unfair labor practice, as charged herein. Accordingly, I am compelled to reject Respondent's argument.⁹

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III above, occurring in connection with the operations of Respondent described in section I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Respondent, having discharged Ralph Campione, Robert Campione, and Walter Dowd because of its desire to rid itself of militant union adherents and not having thereafter offered reinstatement to them, I recommend that Respondent offer them immediate and full reinstatement to their former positions or, if such positions have been abolished or changed in Respondent's operations, then to any substantially similar position without prejudice to their seniority or other rights and privileges and that Respondent make them whole for any loss of pay they may have suffered by reason of Respondent's discriminatory terminations of them, by payment to each of them a sum equal to that which they would have normally received as wages from September 9, 1980, the date of their terminations until Respondent offers them reinstatement, less any net earnings for the interim period. Backpay is to be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289 (1950), Isis Plumbing & Heating Co., 139 NLRB 716 (1962), and Florida Steel Corporation, 231 NLRB 651 (1977).

CONCLUSIONS OF LAW

- 1. Respondent Wolff & Munier, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. Local Union No. 24 of the United Association of Journeyman and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By discharging Ralph Campione, Robert Campione, and Walter Dowd, its employees, because of their activities on behalf of the Union, Respondent discriminated against said employees in violation of Section 8(a)(3) and (1) of the Act.
- 4. By threatening employees with loss of employment should they engage in protected concerted and union activity, Respondent violated Section 8(a)(1) of the Act.
- 5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act. Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case considered as a whole, I hereby recommend the following:

ORDER¹⁰

The Respondent, Wolff & Munier, Inc., Elmsford, New York, its officers, agents, successors, and assigns, shall:

⁸ Denver-Chicago Trucking Company. Inc., 132 NLRB 1416 (1961).

See Owens Corning Fiberglas Co., 236 NLRB 479 (1978).

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

- 1. Cease and desist from:
- (a) Threatening employees with discharge for engaging in protected concerted and union activities.
- (b) Discouraging membership in Local Union No. 24 of the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, or any other labor organization, by discriminating against employees in regard to hire or tenure of employment or any term or conditions of employment.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action which is necessary to effectuate the policies of the Act:
- (a) Offer to Ralph Campione, Robert Campione, and Walter Dowd immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.
- (b) Make Ralph Campione, Robert Campione, and Walter Dowd whole for any loss of pay suffered by them by reason of their discriminatory termination in the manner set forth in the section herein above entitled "The Remedy."

- (c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Post at its Passaic Valley sewage plant jobsite located in Newark, New Jersey, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
- (e) Nofity the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."